Supreme Court, U.S.
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OFFICE

No. 00-

IN THE

Supreme Court of the United States

RICHARD ANDREW NEVARES,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The legislature of the State of California has sought to create more punitive consequences for the commission of crime. Of these consequences, the legislature has added penalties involving the circumstances of the crime. Under § 12022, *et seq.* of the California Penal Code, if the crime involves a firearm, the defendant can receive an additional sentence (or enhancement). The sentencing of most of these enhancements are left within the discretion of the trial judge.

Section 12022.53 of the California Penal Code gives a ten year enhancement for any person who *uses* a gun in the commission of a robbery and must receive a 10 year enhancement to run consecutive to the sentence of the underlying crime. The imposition of this sentence and sentence length is *mandatory*. The sentencing judge has absolutely no discretion on how he is to impose the sentence. Any discretion the judge would otherwise have had has been taken away from the legislature. In fact, once the verdict has been read, the legislature has absolutely determined that the defendant shall receive an additional ten year enhancement.

The question presented is whether the firearm enhancement under § 12022.53 of the California Penal Code is unconstitutional as being violative of the separation of powers doctrine implied within the United States State Constitution.

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Petitioner respectfully petitions for a writ of certiorari to review the decision of the Fourth District Court of Appeals for the State of California, Division One, in this case.

OPINIONS BELOW

The Minute Order of the Superior Court of the State of California finding the petitioner guilty of the crime of robbery and the enhancement under § 12022.53 of the California Penal Code. (Appendix B) ("Pet. App.")

The opinion of the Court of Appeals for the State of California, Judge O'Rourke, affirming the verdict and rejecting petitioner's argument that § 12022.53 of the California Penal Code is unconstitutional is attached hereto (Pet. App. A) and was not published.

STATEMENT OF JURISDICTION

The order of the California Supreme Court en banc dated February 14, 2001, denying the *Petition for Review* was not published. (Pet. App. C)

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). Since this case involves the constitutionality of a state law, the Attorney General has been served.

STATUTORY PROVISIONS INVOLVED

Section 12022.53 of the California Penal Code and other relevant statutes are reprinted in Appendix D.

STATEMENT OF THE CASE

Petitioner Richard Andrew Nevares (hereinafter, "petitioner") was the defendant in the case of *People of the State of California v. Richard Andrew Nevares* (Case CDF 141941), a criminal case that was filed in the Superior Court of the County of San Diego, State of California.

Petitioner was also the appellant in the appeal before the Court of Appeals for the State of California, Fourth District, Division One (case number: B135811) and the petitioner in a *Petition for Review* before the California Supreme Court (Case Number: S094349).

The People of the State of California was the plaintiff in the case of *People of the State of California v. Richard Andrew Nevares* (Case CDF 141941) and appellee in the aforesaid appeal, the respondent to the *Petition for Review* before the California Supreme Court and is the respondent to the petition for writ of certiorari herein.

On December 23, 1998, the petitioner was at his friends' house, wrapping Christmas presents. At the time he reportedly drank liquor and did some drugs. Later, the petitioner began driving a friend's car and dropped off some of his other friends, to head for home.

At 2:00am, on December 24, 1998, Edward Holden was at a Shell Station located at 3901 Clairemont Drive, in San Diego CA. While Mr. Holden was putting gasoline into his tank, the petitioner, in his car, pulled up parallel to Mr. Holden and asked Mr. Holden for money. Mr. Holden said "no".

After Mr. Holden said "no", the petitioner took out a handgun, pointed at Mr. Holden and told him to give the petitioner his money. Mr. Holden took out his wallet, opened it up and went to take out his money. The petitioner then demanded the entire wallet and Mr. Holden complied, despite the fact he wanted to give the appellant only the money; Mr. Holden's compliance was initiated by the fact the petitioner raised the gun even more.

Thereafter, the petitioner drove out of the gas station in the direction of the freeway. Mr. Holden then flagged a passing police vehicle down, giving the officer a description

of the petitioner and the vehicle. The petitioner was apprehended shortly thereafter.

Upon his arrest, it was discovered the petitioner had a plastic baggy of crystal methamphetamine and Ed Holden's wallet. The gun was found on the street.

On February 19, 1999, the petitioner was charged in the information with 1 count of Robbery, (Count 1), a violation of § 211 of the California Penal Code. In connection with that charge it was also alleged as sentencing enhancements that the appellant personally used a handgun in the commission of the crime (§ 12022.5(a)(1) of the California Penal Code) and was armed with a firearm (§ 12022(c) of the California Penal Code). Count 1 also alleged a sentencing enhancement that the appellant used the firearm to commit the crime of robbery, which carried a **mandatory** ten year enhancement, (§ 12022.53 of the California Penal Code).

With regard to § 12022.53 of the California Penal Code, the district attorney has the power/discretion to strike the enhancement, but not the judge; the judge has no discretion in sentencing and has to sentence a defendant to the defendant to the ten year term — no matter what the circumstances.

In Count 2, the information alleged that the petitioner tried to evade the police officers and drove in a reckless manner, in violation of § 2800.2(a) of the California Vehicle Code. Count 3 charged the petitioner with possession of a controlled substance, a violation of § 11377(a) of the California Health and Safety Code, due to the bag of methamphetamine. Count 4 charged the petitioner with the transport of a controlled substance, a violation of § 11379(a) of the California Health and Safety Code, likewise due to the bag of methamphetamine.

Trial was held before the Honorable Judge John M. Thompson, on July 12, 13, 14 and 15, 1999. The petitioner

interposed a defense that due to the drugs and alcohol, the petitioner did not have the specific intent to permanently deprive Edward holden of his wallet.

As part of his defense, the petitioner called Doctor Daniel Munoz. Doctor Munoz, (who had a doctorate in Clinical Psychology), thereafter testified as an expert witness. Dr. Munoz testified that he had come to the conclusion that at the time of the incident, the petitioner was suffering from alcohol and drug abuse. That the petitioner had suffered from severe emotional problems since 8 years of age. Finally the witness diagnosed that the petitioner suffers from blackouts due to the drug and alcohol abuse.

On July 17, 1999, the petitioner was found guilty of all counts. The petitioner was sentenced on September 3, 1999. In submitting the sentencing memorandum, counsel for the defense asserted that to impose the enhancement under § 12022.53(b) of the California Penal Code, without allowing the judge to exercise any discretion, violated the separation of powers doctrine under the United States and California constitution. At the sentencing hearing, counsel for the petitioner brought attention to the fact the petitioner had a head injury when he was four years old and moved to delay sentencing until the petitioner was given a diagnostic study. The request was denied, in that the court went ahead with the sentencing.

Counsel for the petitioner argued that while the enhancement under § 12022.53(b) of the California Penal Code cannot be suspended, nothing is set forth in the statute which prevents it from being stayed. Otherwise, if the statute has been drafted in such a way, as to where the legislature has become the sentencing authority, then the statute violated Art. III, § 3 of the California Constitution, (which embraces the Federal concept of "Separation of Powers") in being in violation of the separation of powers doctrine, set forth

therein. That the judiciary should have the "unique province" of deciding what sentencing is to be imposed and if the judiciary had no such power in a sentence, then it violates the aforesaid doctrine.

At the time of sentencing, the petitioner was 19 years of age and did not have a significant criminal background. The probation officer acknowledged the petitioner would have otherwise been a "marginal candidate for probation", without the mandatory sentencing under § 12022.53 of the California Penal Code. The letters of support with the sentencing memorandum, indicated the petitioner was a person who would otherwise have been amenable to rehabilitation.

In response to counsel's argument, Judge Thompson stated the following:

> I personally find it abhorrent that the legislature would inany way attempt to tell me how to do my job. However, I do not agree that there is any loophole or technicality in the statute. *I think they made it very clear that they were taking out of my hands any discretion I would have. And the record will reflect that absent what I perceive to be an ironclad mandate under this section, I would have exercised that jurisdiction, and I would have taken the opportunity to put together a sentence that would, in essence punish Mr. Nevares for the crime that he committed.*

(Emphasis added.)

> It would not have been the 12 years that I'm going to give him, which is the mandatory term, the lowest term I can give him under the law.
>
> I am taking the position that I have absolutely no discretion to modify. I join in your comments that

> it is, at best, comical that the District Attorney's office has the power to fashion cases in such a way that they take away any discretion the court may have for the purposes of sentencing.
>
> This frankly, with all deference to the Nevares family is not even a tough decision. **There is no decision by me**. (Emphasis added). You could put a monkey up here in a black robe and as long as he or she could read, they could sentence Mr. Nevares to 12 years. This would not be the sentence I would impose had I any discretion whatsoever in the case.
>
> I . . . agree with your statement that by tying my hands we are doing him and everyone a disservice, because there are thousands of families just like this who come into courtrooms every day just like this and have to watch their children go to state prison because some legislator who probably has never tied a criminal case, never presided over a criminal case[1], never had to look in the faces of these families and tell them their son is going to the joint, is telling me what the hill I'm supposed to be do up here.

The court then sentenced the petitioner to a low term of two years on the robbery charge, a lower term of two years on the firearm enhancement under § 12022(c) of the California Penal Code, which was stayed under § 1170.1 of the California Penal Code.

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1. The sponsor of the bill creating § 12022.53 of the California Penal Code was Assemblyman Tom Bodanaro. Consulting with the roster at the California State Legislature indicates that Mr. Bodanaro was a **farmer** before being elected to the State legislature.

As to the enhancement under § 12022.53 of the California Penal Code, the petitioner received the statutorily mandated term of 10 years, which the judge added, "would not [have] been imposed had I any discretion to do so".

As to Count 2, (evading an officer with reckless driving — § 2800.2(a) of the California Vehicle Code), the petitioner received a mid-term of two years to run concurrent. On Count 3, (possession of a controlled substance — § 11377(a) of the California Health and Safety Code), the petitioner received a sentence of 16 months to run concurrent, that was stayed under § 654 of the California Penal Code. As to Count 4, (transport of a controlled substance — § 11379(a) of the California Health and Safety Code), the low term of 2 years to run concurrent.

The petitioner's total term of imprisonment was therefore 12 years. The petitioner received credit for 51 actual days in jail prior to the sentencing and additional credit for 7 days under § 2933.1 of the California Penal Code. The petitioner was ordered to pay a restitution fine of $2,000, as per § 2085.5 of the California Penal Code.

The petitioner, thereafter, filed a timely Notice of Appeal and the matter was heard before the court of Appeals, Fourth Appellate District, Division One. (Case Number: D034193).

On appeal, petitioner argued that § 12022.53 of the California Penal Code was unconstitutional, in being in violation of Article III, § 3 of the California State Constitution. That as written into the statute, the California State Legislature had precluded the judiciary from exercising *any* discretion, in sentencing a defendant upon which an allegation under said enhancement statute was found to be true. The court cannot consider any fact from the particular incident, which would be beneficial or mitigating for a defendant. The court cannot consider the fact he had lived

an otherwise law abiding life prior to the conviction or any mitigating factors. The petitioner also argued that the judge cannot dismiss the allegation, absent the consent of the prosecutor. As such, the statute compromised an exclusive judicial function.

In response, the Attorney General for the State of California admitted a statute which would *condition* the striking of an enhancement upon the consent of the prosecutor, is unconstitutional, citing *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 529-530 (1996). The respondent also argued that the legislature could still completely eliminate judicial discretion in striking an enhancement.

On December 1, 2000, the Court of Appeals affirmed the dismissal. The court agreed with the respondent regarding **striking** an enhancement and said nothing else regarding the Separation of Powers argument.

What the appellate court failed to note in its opinion is that the legislature has controlled the sentence. Sentencing itself a central prerogative of the courts. The judiciary is reduced to a "monkey . . . in a robe . . . [who] c[an] read and write . . ." in how the enhancement had been applied. The petitioner got ten years in prison without regard to any personal mitigating factor, (i.e. or the facts of the case. The petitioner received the low term of 2 years in the underlying robbery, which the court in its discretion imposed owing to said facts of the case.

Thereafter, the petitioner filed a *Petition for Review* to have the case heard before the California Supreme Court. On February 14, 2001, the court denied the petition without comment.

This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

Is the firearm enhancement under § 12022.53 of the California Penal Code unconstitutional in being violative of the Separation of Powers doctrine under the United States Constitution and Article III, § 3?

The aforesaid issues present extremely important question of law since it involves the fundamental constitutionality of a statute and whether it violates the Separation of Powers Doctrine. The very structure of the constitution exemplifies the concept of the separation of powers; Articles I, II and III of the United States Constitution divided the powers of the National Government into three branches: Executive, legislative and judicial, impliedly setting forth that the branches were separate sovereigns from one another. In this way, the constitution prohibits one branch from encroaching the central prerogatives of another. *Loving v. United States*, 517 U.S. 748, 757 (1996). Article III, § 3 of the Constitution of the State of California itself embraced this constitutional principle, explicitly patterning same from the United States United States constitution.

The petitioner contends that the legislature has taken over a sentencing function of the judiciary, in that § 12022.53 of the California Penal Code, precludes the exercise of *any* judicial function in the application of the sentence and otherwise placed it in the hands of the prosecutor; that sentencing is a central prerogative of the judiciary. As Judge Thompson stated, "there is no decision" as to the sentence. The California Legislature has absolutely pre-determined the sentence before it is imposed; discretion exists only in the prosecution and the court's central prerogative of weighing facts, circumstances, mitigating and aggravating factors in passing sentence is taken away from the judge.

That this statute is therefore a violation of the Separation of Powers doctrine as implied in the first three articles of the United States Constitution and was embraced in Article III, § 3 of the California Constitution.

This is a constitutional issue of extreme importance to the judiciary and the application of justice. The petitioner acknowledges there should be standards in sentencing created by the legislature, but the judiciary should be free to exercise those sentencing standards, in conjunction with the facts of the case and with all the principles of justice at the judges disposal, without control by the legislature.

This also poses a great question as to how far can the State Legislatures involve itself in the imposition of punishment for the protection of the health, safety, morals and general welfare of the people within its borders as empowered by the Tenth Amendment of the United States Constitution and not usurp exclusively judicial functions in the administration thereof. Can the State legislature remove any discretion by the court when sentencing a defendant?

The United States Supreme Court should grant this petition in order to settle these issues once on and for all.

I. SECTION 12022.53 OF THE CALIFORNIA PENAL CODE ISUNCONSTITUTIONAL.

A. Section 12022.53 of the California Penal Code violates the United States Constitution, in being in violation of the Separation of Powers Doctrine.

Preserving the separateness of the judiciary serves "to protect the role of the independent judiciary within the constitutional scheme of tripartite government . . . and to safeguard litigant's right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading*

Commission v. Schor, 478 U.S. 833, 848 (1986). *See* R. Fallon Jur., *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harvard L. Rev. 916, 943 (1988) (Article III promotes the "constitutional interest in maintaining a judicial check against arbitrariness . . . or . . . Infidelity to the requirements of law".

As per *Miller, Superintendent, Pendlton Correctional Facility, et al. v. French, et al.*, 530 U.S. 327, 341 (2000), citing *Loving v. United States*, 517 U.S. 748, 757 (1996), as indicated above, one branch of the government may not encroach the central prerogatives of another, even if the boundaries between the three branches are not hermetically sealed. For instance, in *Hayburn's Case*, 2 Dall. 409 (1793), the circuit courts could determine the appropriate amount of a military pension, but the secretary of war was also granted the discretion to adopt or reject the court's findings. The court found that separation of powers doctrine precluded the executive branch from reviewing the decisions of the judiciary and that the law was unconstitutional.

Section 12022.53(a)(4) of the California Penal Code mandates a ten year sentence for a robbery with their use of a handgun, which is likewise mandated to be imposed consecutive to the underlying crime. Subdivision (1) further mandates that the defendant serve 85% of the sentence and Subdivision (h) precludes the application of § 1385 of the California Penal Code, (which allows a court to dismiss a charge in the interests of justice), to this sentencing enhancement.

As indicated above, the record discloses the judge had absolutely no discretion in applying §§ 12022.53(a)(4) and (b) of the California Penal Code. As noted by the judge, the discretion lies within the District Attorney as to whether or not to prosecute under the statute and in prosecuting under the statute, the District Attorney determines the sentence and not the sentencing judge.

Embracing the Separation of Powers doctrine of the United States Constitution, Article III, § 3 of the California State Constitution, "[t]he powers of state government are legislative, executive and judicial. *Persons charged with the exercise of one power may not exercise either of the others* except as permitted by this Constitution". (Emphasis added.)

The reviewing courts of the State of California, in reference to the separation of power analysis has taken the approach set forth in *Santa Clara County Counsel Attys. Assn. v. Woodside*, 7 Cal. 4th 525, 543 (1994): If the legislature has put restrictions upon constitutional functions of the court, the standard for assessing whether the legislature has violated the separation of powers principle in that fashion is if these restrictions defeat or materially impair the exercise of those functions.

Judicial independence is compromised when the court needs the prosecutor's consent to the disposition of a criminal charge pending before the court. *People v. Superior Court (Romero)*, 13 Cal. 4th 487 512 (1996). The case goes on to say at page 516, that the California Supreme Court has never upheld any law purporting to subject the court's discretion to approval by the prosecution. It is unlikely the United States Supreme Court would do the same thing.

Determination of a sentence is fundamentally judicial in nature. *People v. Tenorio*, 3 Cal. 3d 89, 94 (1970). The power to sentence is compromised of the court must bargain with the prosecutor as to its imposition. (*Tenorio*, *supra*).

As noted above, owing to the nature of §§ 12022.53(a)(4) and (b) of the California Penal Code, the prosecution determines the sentence, not the court. In order to refrain from imposing a sentence under this statute, the court must get the consent of the prosecution. The court has absolutely no discretion as to how the sentence is to be imposed.

As noted above, Judge Thompson acknowledged that he would not have imposed this sentence on the petitioner and that he had no decision making power in this case, due to the statute at issue herein.

The petitioner is mindful the elimination of § 1385 of the California Penal Code, in the application of a criminal statute is constitutionally permissible. *People v. Martinez*, 76 Cal. App. 4th 489, 495-496 (2nd Dist. Div. 4, 1999). Notwithstanding, as noted above, § 12022.53 of the California Penal Code place discretion entirely in the hands of the prosecutor and as such, violates Article III, § 3 of the California Constitution and likewise the separation of power contained in Articles I, II and III of the United States Constitution.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA DATED AND FILED DECEMBER 1, 2000

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D034193

(Super. Ct. No. SCD141941)

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD A. NEVARES,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed.

Richard Andrew Nevares appeals from a jury conviction of robbery (Penal Code[1] § 211); evading a peace officer with reckless driving (Veh. Code § 2800.2, subd. (a)); possession of a controlled substance (Health & Saf. Code § 11377, subd. (a)); and transportation of a controlled substance

1. All further statutory references are to the Penal Code unless otherwise specified.

(Health & Saf. Code § 11379, subd. (a)). The jury found true allegations that Nevares personally used a handgun in the commission of the robbery. (§§ 12022, subd. (c); 12022.5, subd. (a)(1); 12022.53, subd. (b)). The court sentenced Nevares to 12 years in state prison: 2 years for robbery, 10 years for the personal use of a firearm enhancement, 2 concurrent years for evading a peace officer, and 2 concurrent years for transporting a controlled substance. Under section 654, the court stayed the sentence for possession of a controlled substance and the other firearm enhancement.

Nevares contends (1) section 12022.53 is unconstitutional because it violates the separation of powers doctrine and (2) insufficient evidence supports his conviction of reckless driving to evade a peace officer (Veh. Code § 2800.2). We affirm.

FACTUAL AND PROCEDURAL HISTORY

Edward Holden testified that about 2:00 a.m. on December 24, 1998, while he was pumping gas into his car, Nevares drove up to him and asked if he had any money. Holden said, "No." In response, Nevares pulled out a revolver, pointed it at Holden, and told Holden to give him all his money. Holden took out his wallet and Nevares demanded the entire wallet. When Holden asked if he could just give Nevares the money, Nevares moved the revolver closer, raised his voice, and told Holden to give him the entire wallet. Holden walked up to Nevares and gave him the wallet. Nevares then drove away.

Right after Nevares drove away, Holden flagged down a police officer. Holden reported the robbery and described

Nevares, his car, and his revolver. The officer broadcast the descriptions to other police units.

Officer Scott Shively testified that while blocking a road due to a serious accident, he heard the description of Nevares and his car. He then saw a car that matched the description make a U-turn to avoid the roadblock. Officer Shively and his partner began to follow the car, which was driving through a residential neighborhood with a posted speed limit of 25 miles per hour. When they were five car lengths behind the car, the officers turned on the lights and siren. Nevares's car sped up to approximately 50 miles per hour. It made two turns and passed two cross streets when it began to smoke. The car then stopped at the curb and the driver put up his hands. The length of the pursuit was six-tenths of a mile. Officer Shively described the driving as erratic.

After Nevares was apprehended, a police officer searched him and found a wallet and a small plastic baggie, which contained .2 grams of methamphetamine. The revolver was found in the street along the path taken during the police pursuit. Holden later identified Nevares as the man who robbed him. Holden also identified the wallet, the car, and the revolver.

Nevares testified he did not remember taking Holden's wallet because he had been drinking, smoking marijuana laced with cocaine, and ingesting lines of crystal methamphetamine.

Appendix A

DISCUSSION

I. *The Constitutionality of Section 12022.53*

Nevares contends section 12022.53 violates the separation of power doctrine. (Cal. Const. Art. III, § 3.) Section 12022.53 mandates a consecutive 10-year sentence enhancement for defendants who personally used a handgun to commit certain crimes, including robbery (§ 12022.53, subds. (a)(4), (b).). Subdivision (h) of section 12022.53 prevents the court from striking an allegation or finding under the section "[n]otwithstanding Section 1385 or any other provision of law." Subdivision (g) prevents the court from suspending the execution of the sentence or granting probation.

Nevares contends section 12022.53 gives the prosecutor discretion, in that the prosecution decides whether or not to charge a defendant under that section, but denies discretion to the court, which must apply the mandatory sentence. Nevares relies upon the principle that "a prosecutor may not be vested with the power to foreclose the exercise of a judicial power . . . ." (*People v. Tenorio* (1970) 3 Cal.3d 89, 95.) The California Supreme Court reaffirmed this principle in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, when it determined a statute violated the separation of powers doctrine because it allowed the court to strike a prior felony conviction allegation only upon the motion of the prosecutor. However, section 12022.53 does not give the court the discretion to strike the finding or allegation *only* upon the prosecutor's motion; it gives the court no discretion at all. Therefore, this case is not like *Tenorio* or *Romero*, for it does not "make the exercise of a judicial power subject to

the prosecutor's approval." (*Romero*, *supra*, 13 Cal.4th at p. 516.) Instead, this case involves the power of the Legislature to fix penalties for gun use in a crime.

" '[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch.' " (*Ibid.* quoting *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.) Therefore, the Legislature may "eliminate the courts' power to make certain sentencing choices . . . ." (*Ibid.*) In fact, the Court upheld the Legislature's power to eliminate the courts' ability to strike a personal use of a firearm enhancement under section 12022.5. (*People v. Thomas* (1992) 4 Cal.4th 206.) Similarly, the Legislature may eliminate the courts' ability to strike the personal use enhancement under section 12022.53. Therefore, section 12022.53 does not violate the separation of power doctrine.

II. *Reckless Driving*

Nevares contends there was insufficient evidence of reckless driving to sustain his conviction of reckless driving to evade a police officer. (Veh. Code, § 2800.2.) We review challenges to the sufficiency of the evidence in a criminal case, by reviewing to entire record " 'in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

Appendix A

Here, the jury chose to convict Nevares of Vehicle Code section 2800.2 instead of Vehicle Code section 2800.1, the lesser-included offense of flight from a pursuing police officer. (*People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680.) Vehicle Code section 2800.2, subdivision (a) provides in part: "If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1, and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle . . . shall be punished . . . . The distinction between the two crimes is that to commit Vehicle Code section 2800.2, the defendant must drive "in a willful or wanton disregard for the safety of persons or property." (Veh. Code § 2800.2, subd. (a).)

Here, there was substantial evidence Nevares drove in willful or wanton disregard for others' safety. He drove erratically at 50 miles per hour in a residential area. He was intoxicated on both alcohol and a mixture of drugs. We reject Nevares's contention his driving was not reckless because he drove at this unsafe speed for only six tenths of a mile and did not injure anyone. Nevares stopped only because his car's engine overheated. Additionally, the standard is not whether the driving caused injury but whether injury was likely. (See *People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680 [finding substantial evidence of willful disregard for safety in case where there was no injury to persons or property].)

Appendix A

DISPOSITION

The judgment is affirmed.

s/ O'Rourke
O'ROURKE, J.

WE CONCUR:

s/ Nares
NARES, Acting P. J.

s/ Haller
HALLER, J.

APPENDIX B — JURY VERDICT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO DATED JULY 16, 1999

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

JURY VERDICT

SCD141941 DA PC004062

DATE 7-16-99 AT 9:45 A.M.

PRESENT: HON. JOHN M. THOMPSON

JUDGE PRESIDING DEPARTMENT 38

CLERK S. BLEVINS

REPORTER E. STUDENBERG

CSR# 7975

REPORTER'S ADDRESS: P.O. BOX 128, SAN DIEGO, CA 92112-4104

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

NEVARES, RICHARD A.

DEFENDANT

Appendix B

REBECCA BLAIR
DEPUTY DISTRICT ATTORNEY

BRUCE SOBEL
ATTORNEY FOR DEFENDANT (RETAINED)

VIOLATION OF PC211, VC2800.2(a), HS11377(a), HS11379(a), 1-PC12022.5(a)(1), PC12022.53(b), PC12022(c)

* * *

DEFENDANT ☒ PRESENT.

* * *

LATEST INFO./INDICT. FILED 2-19-99.

* * *

GUILTY VERDICTS TO CT 1 PC211** W/PC12022.5(a)(1), PC12022.53(b), PC12022(c) ALLEGS., CT 2 VC2800.2(a), CT 3 HS11377(a), CT 4 HS11379(a)

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☒ DEFENDANT REMANDED TO CUSTODY OF SHERIFF ☒ WITHOUT BAIL.

* * *

Appendix B

PROB. HRG & SENTG IS SET FOR/CON'D/TRAILED TO 8-13-99 AT 8:30 A.M. IN DEPARTMENT 38 ON MOTION OF COURT/DDA/DEFENDANT.

* * *

☒ BOND IS ☒ EXONERATED

* * *

☑ REPORT ORDERED: ☑ PRESENTENCE

* * *

☒ DEFENDANT FOUND GUILTY BY ☒ JURY VERDICT

* * *

☒ DEFENDANT REFERRED TO/ORDERED TO REPORT IMMEDIATELY TO PROBATION DEPT. BELOW FOR INTERVIEW:

☒ 330 W. BROADWAY, 5TH FL., SAN DIEGO

* * *

s/ [illegible]
JUDGE OF THE SUPERIOR COURT

APPENDIX C — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW DATED AND FILED FEBRUARY 14, 2001

Court of Appeal, Fourth Appellate District, Division One – No. D034193

S094349

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD A. NEVARES,

Defendant and Appellant.

Petition for review DENIED.

s/ GEORGE
Chief Justice

APPENDIX D — RELEVANT CODES

CAL. PENAL CODE § 1385

§ 1385. Order dismissing action; Striking of priors for purposes of sentence enhancement.

(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.

(c)(1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).

(2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a).

* * *

Appendix D

CAL. PENAL CODE § 12022.53

§ 12022.53. Sentence enhancements for persons convicted of specified felonies who use firearm; Limits on credits on terms.

(a) This section applies to the following felonies:

(1) Section 187 (murder).

(2) Section 203 or 205 (mayhem).

(3) Section 207, 209, or 209.5 (kidnapping).

(4) Section 211 (robbery).

(5) Section 215 (carjacking).

(6) Section 220 (assault with intent to commit a specified felony).

(7) Subdivision (d) of Section 245 (assault with a firearm on a peace officer or firefighter).

(8) Section 261 or 262 (rape).

(9) Section 264.1 (rape or sexual penetration in concert).

(10) Section 286 (sodomy).

(11) Section 288 or 288.5 (lewd act on a child).

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(12) Section 288a (oral copulation).

(13) Section 289 (sexual penetration).

(14) Section 4500 (assault by life prisoner).

(15) Section 4501 (assault by prisoner).

(16) Section 4503 (holding a hostage by prisoner).

(17) Any felony punishable by death or imprisonment in the state prison for life.

(18) Any attempt to commit a crime listed in this subdivision other than an assault.

(b) Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony personally used a firearm, shall be punished by a term of imprisonment of 10 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony. The firearm need not be operable or loaded for this enhancement to apply.

(c) Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony intentionally and personally discharged a firearm, shall be punished by a term of imprisonment of 20 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony.

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(d) Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony.

(e)(1) The enhancements specified in this section shall apply to any person charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved.

> (2) An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1, shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.

(f) Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section

12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).

(g) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section.

(h) Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.

(i) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 or pursuant to Section 4019 or any other provision of law shall not exceed 15 percent of the total term of imprisonment imposed on a defendant upon whom a sentence is imposed pursuant to this section.

(j) For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision

of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

(k) When a person is found to have used or discharged a firearm in the commission of an offense that includes an allegation pursuant to this section and the firearm is owned by that person, a coparticipant, or a coconspirator, the court shall order that the firearm be deemed a nuisance and disposed of in the manner provided in Section 12028.

(*l*) The enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5.

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